

5. Whether it is to be circulated to the Civil Judge?

No.

SHAILESHBHAI L MEHTA

Versus

GHANSHYAM EDUCATION TRUST

Appearance:

MR YN OZA for Petitioner

MR SR BRAHMBHATT for Respondent No. 1

GOVERNMENT PLEADER for Respondent No. 2, 3

LETTERS PATENT APPEAL No 655 of 1997

in

SPECIAL CIVIL APPLICATION No 3618 of 1997

SHAILESHBHAI L MEHTA

Versus

GHANSHYAM EDUCATION TRUST

Appearance:

MR YN OZA for appellant

MR SR BRAHMBHATT for Respondent No. 1

GOVERNMENT PLEADER for Respondent No. 2

SERVED BY DS for Respondent No. 3

C.K.Thakker & S.D.Pandit.JJ

Date of decision: 08/09/97

ORAL JUDGEMENT(Per: Thakker.J)

Admitted. Ms. V.P.Shah for Mr. S.R.Brahmbhatt appears and waives service of notice of admission on behalf of respondent no.1 - management. Ms. Binoda Gajjar, learned Assistant Government Pleader waives service of notice of admission on behalf of respondent no.2. Learned counsel the appellant states that no relief is claimed against respondent no.3 Gujarat Secondary Education Tribunal. The appellant has joined the Tribunal as party respondent since the petitioner had joined the Tribunal as respondent in petition. In the facts and circumstances and with the consent of the parties, the matter is taken up for final hearing today.

2. These two appeals arise out of an interlocutory order passed by the learned single Judge in Special Civil Application Nos.3618 and 3622 both of 1997. On May 7,1977 the learned single Judge admitted the petitions by issuing Rule thereon. Regarding the interim relief, the learned single Judge observed:

"Heard the learned advocates for the parties.

Rule.

Interim order in terms of para 16(i)"

Para 16(1) of the petition i.e. Special Civil Application No.3618 of 1997 reads thus:

" 16. During the pendency and final hearing of this petition, this Hon'ble Court be pleased to pass an interim order:

(i) staying the execution, operation and implementation of the order and judgment of the learned Tribunal dated 17.4.1997 passed in Application No. 767 of 1996 and Appeal No. 2 of 1997"

A neat question of law has been raised in these appeals. It is, therefore, not necessary to go into questions of fact though submissions have been made by both the parties. Some undisputed facts are: the appellant was working as a Head Clerk with Ghanshyam Education Trust-respondent no.1 (hereinafter referred to as the "management"). On March 7,1996, a show cause notice was issued on the appellant calling upon him as to why departmental proceedings should not be initiated in respect of certain allegations levelled against him. Inquiry was held and a report was submitted on October 8,1996 and the appellant was found guilty. It was therefore, decided to dismiss him from service on November 4,1996. In accordance with the provisions of Gujarat Secondary Education Act 1972(hereinafter referred to as "the Act"), a proposal for dismissal of the appellant was sent to the authorised officer, viz.District Education Officer (hereinafter referred to as the "DEO") on the very day i.e. on November 4,1996 was received by the DEO on the same day. From the record, it appears that the DEO heard the parties on December 10,1996 and an order was passed on December 17,1996 disapproving the action of dismissal proposed by the management. It is also an admitted fact that the order passed by DEO was despatched by office of DEO to the management on the next day i.e. on December 18,1996. On December 19,1996 the management passed an order of dismissal observing that a proposal of dismissal was sent by the management for approval to DEO on November 4, 1996 and within forty five days, no communication was received by the management one way or the other and hence, the action proposed by management was deemed to be approved. The management appears to have received the order passed by DEO on December 21,1996.

3. When the appellant came to know that an order of dismissal was passed even though DEO did not approve the proposed action of the management he approached the Gujarat Secondary Education Tribunal by filing Application No. 767 of 1996. Likewise when the management received the order of DEO disapproving the action of dismissal proposed by the management, it also filed Appeal No. 2 of 1997. Both the appeals are pending.

4. When the matters were placed before the Tribunal for hearing it was contended on behalf of the appellant that the action of the management in dismissing him from service was illegal and contrary to the provisions of Section 36 of the Act. The action was also not in consonance with the decision rendered by a Division Bench of this Court in Satsangi Shishuvihar Kelvani Trust & ors. vs. P.N.Patel & ors. (1997) 18 GLR 616. A prayer was therefore, made to restrain the management from implementing and/or operating the order of dismissal. It was strongly objected by the management. After hearing the parties, the Tribunal granted the relief in favour of the appellant. In para 7 of the order, the Tribunal observed :

"For the reasons narrated hereinabove, both the cases are admitted. By way of I.R. in appln.no.. 767/96 the further implementation and execution of the impugned order dated 19.12.96 terminating the services of the applicant is stayed till final disposal of this application. Appeal No. 2/97 is admitted and the prayer for I.R. in appeal no. 2/97 is negatived. Due to heavy pressure of work the date for final hearing cannot be given. However, parties are at liberty to request in the month of December 1997 for fixing the date of final hearing.

At this stage managing trustee presented pursis for stay of this order, I do not find any reason to do so hence request negatived."

5. Being aggrieved by the order passed by the Tribunal granting interim relief to the appellant, the management filed the above petition. The learned single Judge issued Rule . Operation and implementation of the order passed by the Tribunal was also stayed. It is against that interim order that present Letters Patent Appeals are filed by the appellant.

6. Mr. Oza learned counsel for the appellant contended that the order passed by the Tribunal was in accordance with law and relying on the provisions of Clause (b) of sub-section (1) read with Sub-section (2) of Section 36 as interpreted by a Division Bench of this Court in Satsangi Shishuvihar Kelavani Trust the Tribunal had granted interim relief. The said order could not be said to be illegal or unlawful and it could not have been stayed by the learned Single Judge. It was submitted that in undoubted exercise of jurisdiction, the Tribunal suspended implementation and operation of the order of dismissal passed by the management. The learned Single Judge has committed an error of law in permitting such illegal order to operate. It was also urged that the learned single Judge has not recorded any reason whatsoever for staying order of the Tribunal. The counsel submitted that when the point is concluded by a decision of the Division Bench, no order could have been passed by the learned Single Judge ignoring a binding decision particularly when following the said decision, the Tribunal had granted relief. Mr. Oza, therefore, submitted that this is eminently a fit case in which, interference of a Division Bench is called for.

7. Ms. V.P.Shah Sr.Counsel for Mr. S.R. Brahmbhatt, on the other hand supported the order passed by the learned single Judge. She submitted that by granting interim relief, the Tribunal virtually allowed the application filed by the appellant and the learned single Judge was, therefore, right in staying operation of the order passed by the Tribunal which had suspended order of dismissal. She submitted that as per settled law, no interim relief which is in the nature of final relief, can be granted at admission stage. In the instant case, the controversy is whether an order of dismissal passed by the management on December 19,1996 could be said to be in accordance with law. When that question is pending before the Tribunal and the legality thereof is yet to be tested, the Tribunal could not have granted interim relief against operation of the said order. Till the order is declared illegal and/or contrary to law, it cannot be suspended. Hence, the learned single Judge was right in staying operation of the order of the Tribunal. On merits, Ms. Shah urged that conjoint reading of Sections 36,37 and 38 of the Act and Regulation 27 of the Gujarat Secondary Regulations 1974, would make it clear that the action taken by the management is legal and lawful and it could have been taken in the facts and circumstances of the case. It therefore, cannot be said that the order passed by the learned Single Judge deserves interference by a Division

Bench . Regarding Satsangi Shishuvihar Kelavani Trust Ms. Shah conceded that the judgment is against the management but the said decision is very old of the year 1976. The law laid down in that case requires reconsideration.

8. In the facts and circumstances of the case in our opinion the order passed by the learned single Judge requires interference and it deserves to be quashed and set aside. For considering the point, it is necessary to examine the scheme of Section 36 of the Act. Sub-sections (1) and (2) thereof are material for the purpose of deciding the controversy raised in these appeals and may be reproduced:

" 36(1) No person who is appointed as a head-master, a teacher or a member of non-teaching staff of a registered private secondary school shall be dismissed or removed or reduced in rank nor shall his service be otherwise terminated by the manager until-

(a) he has been given by the manager a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and

(b) the action proposed to be taken in regard to him has been approved in writing by an officer authorized in this behalf by the Board:

Provided that nothing in this Sub-section shall apply to any person who is appointed for a temporary period only.

(2) The officer referred to in clause (b) of Sub-section (1) shall communicate his decision within a period of forty-five days from the date of receipt by him of the proposal under the said clause (b) and if such decision is not communicated to the manager by the said officer within such period the action proposed to be taken under the said clause (b) shall be deemed to have been approved by the said officer."

(emphasis supplied)

9. Reading sub-section (1) of Section 36 of the Act, it appears to us that intention of the Legislature is very clear. It starts with a negative phrase, "No person shall be dismissed or removed or reduced in rank etc." It

further states that two conditions must be fulfilled before an action of dismissal, removal or reduction is taken. Unless both conditions are satisfied, action cannot be said to be in accordance with law. The two conditions are, firstly, such person must be given reasonable opportunity of showing cause against an action proposed to be taken in regard to him; and secondly, the action proposed to be taken in regard to him has been approved in writing by an officer authorised in that behalf by an officer authorised by the Board.

10. In our opinion unless both the conditions are complied with, an order of dismissal, removal or reduction in rank cannot be said to be an order in the eye of law. Sub-section (2) enjoins a duty on the management to forward a proposal to such officer, and the officer is bound to pass an order on such officer must pass appropriate order on the proposal forwarded by the management within a period of forty-five days from the date of receipt by him of the proposal. If such officer fails to communicate to the management his decision within the stipulated period, the action proposed to be taken by the management shall be deemed to have been approved by the said officer.

11. Now the question arises in this case is as to how this period of 45 days specified in sub-section (2) of Section 36 of the Act should be computed. This is a pertinent question inasmuch as if an officer authorised by the Board does not communicate his decision on receipt of the proposal made by the management; "the action proposed to be taken shall be deemed to have been approved" by him.

12. The point came to be considered by a Division Bench in *Sastangi Shishuvihar Kelavani Trust*. (supra) . In para 10, the Division Bench observed:

"The other controversy raised is as to the period of 45 days because under sec. 36(2) the officer referred to in sec. 36(1)(b) is required to communicate his decision within a period of forty-five days from the date of receipt by him of the proposal and if such decision is not communicated to the manager within the said period, the action proposed to be taken under the said clause(b) shall be deemed to have been approved by the said officer. The term 'communicate' would have of course two ordinary literal meanings, both of transmission by the authorised officer and receipt of the

management....."

13. Relying upon various decisions of the Supreme Court and referring to the provisions of Section 65 of the Bombay Land Revenue Code in the light of the decision of the Supreme Court in State of Gujarat vs. Patel Raghav Natha A.I.R. 1969 S.C. 1297 the Division Bench proceeded to state:

"...The same would be true even under the present scheme where legislature must be deemed to have treated the matter as so urgent that approval in the form of previous permission is deemed to be granted to the management, if the authorized officer does not communicate his decision within this 45 days, period from the date of the receipt of the proposal by him. He must also hold an enquiry and communicate his reasoned decision within this statutory period. As this is the period provided by the legislature for the operation of this fiction, there must be an element of certainty of the period of 45 days. One terminal is already fixed of the receipt of the proposal and the other terminal must also be fixed viz. of the communication of the order by sending this order to the management irrespective of the fact when it actually reaches the management. Any other interpretation would curtail this 45 days' period which the legislature has advisedly allowed to this authorised officer and an element of uncertainty shall be introduced because of the time taken for despatch by reason of postal delay or otherwise. This fiction of the legislature reveals the whole object of this provision that the enquiry which this authorized officer must make for granting his previous approval must be finished within this 45 days' period as the matter is considered of that urgent nature and as the management has to shoulder the responsibility of continuing the concerned employee in service during this period. The legislature having achieved a just balance between the conflicting interests of the management and the concerned teacher, and the expeditious disposal of this approval action being the true object of this provision, the legislative fiction must be given its full play and effect. Such a provision would not be capable of any waiver by the management because on the expiry of statutory period of 45 days fiction would operate by its own force. No

doctrine of waiver could be invoked against statutory provision. Therefore, merely because the management participated in the further enquiry or it seeks to avoid the enquiry by prolonging the same, this statutory period cannot be extended...."

(emphasis supplied)

14. Reading the above observations, there is no doubt in our minds that the point is concluded by a Division Bench of this court in favour of the appellant. This legal position of law is not disputed even by Ms. Shah. She however, submitted that the management was not made aware of the decision within forty-five days as contemplated by sub section (2) of section 36 of the Act. If after forty five days and before the receipt of the order of non approval by DEO, an action is taken, by the management, it could not be said to be contrary to law . In any case, legality of such action can be decided only at the time of hearing of the matter. She submitted that December 18,1996 was forty- fifth day but the order of DEO was not received by the management on that day. It was received on December 21,1996 and during the intervening period, the management passed the order of dismissal on December 19,1996 i.e. on forty-sixth day which could not be said to be illegal. Mr. Oza contended that even December 19,1996 was forty-fifth day as under General Clauses Act 1897, the day on which the proposal was received by the DEO should be excluded. We are not expressing any opinion on that point. The fact however, remains that when order was passed by DEO on December 17,1996 period of forty-five days was not over. Similarly when it was communicated by the DEO on December 18,1996 the period of forty five days was not over. In these circumstances, in our opinion, the action of dismissal of the appellant cannot be said to be in consonance with the provisions of sub-section (2) of Section 36 of the Act and cannot be given effect.

15. Ms. Shah relied upon the following decisions:

1. Dhondoram Tatoba Kadam vs Ramchandra Balwantrao 1995(1) GLH 345.
2. R.Thiruvirkolam vs. Presiding Officer & anr. AIR 1997 SC 633
3. Ambalal Motiram Patel, Chairman New English School Trust vs. Smt.

4. . Shriji Vidyaluya & ors.

vs. Patel Anil Kumar Lallubhai & ors.

Civil Appeal No. 6724 of 1983 decided

by the Supreme Court on August 20,1997.

In our opinion the above decisions are not relevant to the controversy raised in the present appeals. To us, the order passed by the Tribunal was according to law. Considering the provisions of sub section (2) of Section 36 of the Act and the ratio laid down by this court in Satsangi Shishuvihar Kelavani Trust, interim relief was granted by the Tribunal. Regarding the prayer of Ms. Shah that the judgment is very old and requires reconsideration, we must express our inability to do so. We do not think that the legal position enunciated by this court in the above case does not lay down correct law or doubtful. Moreover, the legislature has used different phraseology in the same sub-section in respect of taking of decision by the authorised officer on the proposal of the management and communication of the order passed by such officer to the management. In case of former, the period of forty-five days begins from the date of "receipt" of the proposal by the officer; whereas in case of latter, the relevant date is the date of decision taken by the officer and communication of such decision to the management. Considering the difference in language also, we are in respectful agreement with the ratio laid down in Satsangi Shishuvihar Kelavani Trust. We therefore, reject the prayer of the learned Sr.counsel Ms. Shah to refer the matter to a larger Bench.

16 . In our judgment there was no error of law or of jurisdiction apparent on the face of the record committed by the Gujarat Secondary Education Tribunal in granting interim relief in the light of statutory provisions as interpreted by this Court in Satsangi Shishuvihar Kelavani Trust. It is settled law that the High Court does not exercise appellate powers and cannot substitute its findings for the findings recorded by the tribunal. Where the order is without jurisdiction or has been passed on misconstruction of a provision of law, it can interfere. Such error, however should be patent and apparent on the face of the record. In the instant case, it cannot be said that by granting interim relief the Tribunal exceeded its authority or exercised jurisdiction not vested in it by law. That order, therefore, could not have been interfered by the learned Single Judge and that too without recording reasons. We are, therefore, of the view that these Letters Patent Appeals deserve to

be allowed. Appeals are accordingly allowed. The order passed by the learned Single Judge is quashed and set aside and the order passed by the Tribunal is restored. In the facts and circumstances of the case, there shall be no order as to costs.

17. Ms. Shah for respondent no.1 states that the management intends to approach the Apex Court. She, therefore, prays that operation of this order may be stayed for some time so as to enable the management to approach higher forum. The request is reasonable. In the facts and circumstances of the case, this order is kept in abeyance till October 6,1997.

(C.K.Thakker.J)

(S.D.Pandit.J)